

language between Track A which requires that a BOC be "providing" access versus the requirements of Track B that access be "offered." Sprint refers to legislative history indicating an expectation that the competitor be operational.

Finally, Sprint contends that it would be contrary to the public interest to allow SWBT in-region authority at this time. InterLATA entry is the only incentive which can be given to a BOC to cooperate in opening its local monopoly. Further, without adequate competition at the local exchange level, there will be no market disciplining effect of SWBT to refrain from anti-competitive conduct in the InterLATA market, such as discrimination and cross-subsidization. Sprint also argues that the Commission should consider the competitive evolution of other markets within Oklahoma, as well as the prospects for competitive entry in other states in which SWBT now enjoys market power.

Sprint's reply comments attached two exhibits for the Commission's consideration. The first exhibit, a copy of the Hearing Examiner's Proposed Order in the Illinois Commerce Commission's investigation into Ameritech's compliance with section 271, held that the term "providing" under the federal Act means actually furnishing or "making available;" that leased facilities do not qualify as a carrier's "own facilities;" that the term "predominately" means greater than 50% and that Tracks A and B are two separate and distinct alternatives that cannot be combined. The second attachment is a copy of an order of the Georgia Public Service Commission rejecting BellSouth's Statement of Generally Available Terms and Conditions. One reason for the rejection was that BellSouth's rates were interim only and not cost-based.

The pre-filed testimony of Edward M. Phelan addressed the economic and public interest objections that should be considered by the Commission in this proceeding. Mr. Phelan concludes that interconnection agreements must be demonstrated to be working in practice on a commercial scale before checklist compliance can be regarded as economically meaningful, and in order to meet the public interest standard.

Cynthia Meyer, the Local Market Development Director responsible for negotiating Sprint's terms for local market entry with Southwestern Bell Corporation and for successful execution of Sprint's local market entry in the Southwestern Bell states, also prefiled testimony on behalf of Sprint. Ms. Meyer's testimony discusses operational parity provided by SWBT's

operational support systems interfaces (OSSs). Ms. Meyer concludes that an interconnection agreement which states that the ILEC will provide operational parity is not assurance that this will in fact happen in a manner that will allow the CLEC to be competitive in the local market. She further concludes that for a major CLEC to move from a signed interconnection agreement to being competitive in the local market is a long and complicated process that will take years. This is because local competition cannot be attained until facilities-based CLECs are operational and a majority of consumers have choices for local telephone service that are not ultimately controlled by the incumbent LEC.

Ms. Meyer states that for local competition to occur, the ILEC must provide the CLEC interfaces to those services that enable CLECs to provide services to their customers at least equal in quality and timeliness to that offered by ILECs to their customers. One should compare what SWBT does for Sprint to what SWBT does for itself in the process of provisioning end user service.

Ms. Meyer also testified regarding the various steps that a CLEC must complete in going from the contractual agreement to operational readiness. Interfaces and processes must be designed, built, tested for several different categories. Sprint and SWBT are at the very beginning of this process, designing the interfaces to SWBT's processes and operations support systems to meet customer requirements specified in the Agreement. Ms. Meyer states that of the various methods of OSS interfaces, the only ones that have potential for full operational parity capability are electronic data interchange (EDI) and electronic bonding, neither of which is operationally available today with SWBT. Ms. Meyer attached Exhibit 1 to her testimony which reflects Sprint's understanding of where SWBT stands with respect to each of Sprint's requirements for operational parity for each functional component of operational interface. The exhibit indicates that there is no area of OSS interface functionality that meets Sprint's requirements for operational parity. Ms. Meyer states that the most optimistic date that operational parity with SWBT can be attained is probably late 1998. With respect to operational parity for resold services, SWBT has not indicated to Sprint that any OSS interface processes are fully documented or tested (with the exception of facsimile). Nor does SWBT have any operational automated systems for OSS interface for unbundled network element services.

Ms. Meyer indicated that SWBT has not been timely in providing information that Sprint has requested and needs in order to become operationally ready, including process flow diagrams and documentation on operations interface processes. Nor has it provided Sprint information needed immediately for market entry planning.

Ms. Meyer indicated other concerns regarding SWBT's cooperation in Sprint's efforts to bring local competition to Oklahoma. For example, even after completing an interconnection contract with SWBT, it is unclear what all of the potential SWBT charges associated with unbundled network element services will be. According to Meyer, SWBT promised to provide these missing rate elements months ago, but has not yet done so, and thus it is impossible to plan for use of a service when the complete list of costs is unknown.

Brooks Fiber Communications of Oklahoma, Inc., and Brooks Fiber Communications of Tulsa, Inc. ("Brooks") Brooks filed initial comments verified by its witness, Ed Cadieux, and reply comments verified by the same witness. In its initial comments, Brooks indicated that it was certified as a competitive access provider in April of 1996, and in August of 1996, its authority was expanded to include authority to operate as a competitive local exchange company.

Additionally, Brooks has intrastate dedicated and switched services tariffs in Oklahoma. On October 2, 1996, the Commission approved an interconnection agreement entered into between SWBT and Brooks. In January 1997, Brooks began offering switched local exchange services to its first group of customers. As of March 1, Brooks' Oklahoma operations were limited to 13 business customers in Oklahoma City, 7 business customers in Tulsa, and 4 residential customers. All of the residential customers were receiving service on a test basis and all are receiving service through resale of SWBT local exchange service. Brooks confirmed that this information was accurate as of the date of the hearing as well.

Brooks states its intention to offer service as a facilities-based provider, combining its facilities with unbundled network elements of the incumbent LEC. However, Brooks states that at this point, it cannot begin utilizing SWBT's unbundled loop facilities in Oklahoma because none of the collocations which Brooks needs to interconnect to SWBT's unbundled loops have been completed. Not until these collocations are completed can Brooks begin testing with

SWBT's ordering, provisioning, and related operational support systems, and then commence offering unbundled loop-originated service to customers. Additionally, Brooks states that it has experienced problems with SWBT in implementation of interim number portability through remote call forwarding. Every one of the customer conversions has experienced problems, providing an immediate negative customer impression which is damaging to the success of a new entrant.

Brooks also states that by signing and supporting a negotiated interconnection agreement with SWBT, it did not and does not concede that rates, terms and conditions contained therein are consistent with and satisfy the substantive requirement of sections 251 and 252 of the federal Act. The standard for approval of a negotiated interconnection agreement is limited in nature. It does not include a determination regarding whether the rates contained in the agreement are cost-based.

Brooks also provides an analysis of section 271 requirements in the context of its operational status and its experience with SWBT. Brooks submits that SWBT is required to pursue Track A because Brooks is a facilities-based provider who requested access prior to 10 months after passage of the federal Act. Track B is intended to provide a default option to protect a BOC from circumstances due to interconnector inaction, a circumstance which did not occur in Oklahoma.

Brooks submits that two critical questions must be answered. First, whether SWBT is providing Brooks access to unbundled network elements and interconnection consistent with substantive standards of section 251(c)(2) and (3), and 252(d)(1). Second, whether Brooks is offering telephone exchange service to residential and business customers either exclusively or predominantly over its own telephone exchange facilities. Brooks answers both questions in the negative. The requirement to provide access and interconnection consistent with the substantive standards of the Act contemplates the actual provision of these elements in a meaningful manner.

Because Brooks is not yet able to begin purchasing of unbundled loops from SWBT, this requirement has not been met. Further, because there has been no determination that rates are based on cost, the checklist cannot be met.

With respect to the second question, Brooks states that it is not providing service exclusively or predominantly over its own facilities because it remains heavily dependent upon SWBT facilities. Brooks' experience with deploying collocations illustrates SWBT's continuing control over critical bottleneck facilities.

Finally, Brooks addresses the public interest test, stating that it must focus on an evaluation of whether a grant of a BOC's in-region application will, on balance, produce benefits for consumers by creating, preserving and enhancing competition in the local exchange and interexchange markets. Because SWBT retains substantial power at this stage to impede Brooks' ability to operate successfully in the local market, and because once SWBT is granted interLATA authority its incentive to avoid activities which impede local competitors will be reduced, it would be contrary to the public interest to support the application for in-region authority.

Upon cross-examination by the Attorney General, Mr. Cadieux testified that certain allegations made about Brooks by SWBT in its February 20 draft filing are inaccurate. The witness refuted SWBT's assertion that Brooks is providing residential service over its own facilities in Oklahoma, stating that Brooks has in-service four test residential circuits to Brooks employees and that each of these circuits is provided by resale of SWBT local exchange service. He testified that Brooks had consistently indicated that it does not intend to use resale of SWBT service except in limited situations, and that unbundled loop availability would be required for Brooks to offer residential service.

Mr. Cadieux explained that Brooks is not currently marketing its service to residential customers because, in order to provide facilities-based service, Brooks must either connect the customers directly or through unbundled loops. It is not economically feasible to directly connect most residential customers, and for the reasons explained above, Brooks cannot currently connect customers through unbundled loops. Mr. Cadieux further explained that although it has an approved tariff, it will not process applications for residential service at this point. Its tariff is subject to availability, and the service is not currently available for the reasons discussed above.

Cox Communications Oklahoma City, Inc. ("Cox") Cox filed only reply comments in this case. Cox indicated that it supported the initial comments filed in this cause by the Attorney General, Brooks Fiber and other prospective competitive local exchange carriers. Cox indicated that it has a certificate of public convenience and necessity from this Commission and intends to provide local exchange and exchange access services over its own facilities or predominantly over its own facilities to both residential and business customers in Oklahoma, and that it has requested access and interconnection with Southwestern Bell as described in Section 271(c)(1)(a) of the federal Act. Cox also indicated that its facilities currently pass more than 95% of the residential households in Oklahoma City.

Cox agrees with other parties who contend that subsection (c)(1) of the federal Act provides for two mutually exclusive bases for requesting interLATA authority. Because at least two facilities-based providers have requested interconnection, i.e. Brooks and Cox, SWBT must rely solely on agreements made with such facilities-based providers. Cox also contends that SWBT must allow actual interconnection of the competitors' networks with its network which meets the requirements of Section 271(c). Cox notes that to date, SWBT is actually providing interconnection to only one provider, Brooks, and that by Brooks' own account, many of the elements contained in the interconnection agreement are not being provided to Brooks at this time.

Cox also contends that SWBT has not met the competitive checklist. First, it states that SWBT cannot comply with the first element of the checklist requiring interconnection at just and reasonable rates based on the cost of providing the interconnection or network element. Cox states that there has been no determination that SWBT's rates are based on costs, since many of the rates are interim rates pending completion of cost studies in SWBT's arbitration with AT&T.

Cox also contends that SWBT does not meet the ninth element of the checklist, i.e. nondiscriminatory access to numbers for assignment to other carrier's telephone exchange service customers, because SWBT has restricted the assignment of ten NXX codes that Cox needs to initiate local exchange service. Cox also contends that SWBT has not complied with the thirteenth element of the competitive checklist, requiring reciprocal compensation arrangements in accordance with the pricing standards of the federal Act. There has not yet been

a determination by this Commission that SWBT's transport and termination rates are just and reasonable.

Finally, Cox responds to SWBT's argument that "holding out" terms and conditions satisfies the competitive checklist. Cox maintains that SWBT must be actually providing interconnection and access to its network when it has received requests for interconnection from facilities-based providers.

During the hearing on April 15, 1997, Cox supplemented its reply comments with the following information. Cox stated that it had been unable to provide a witness in this proceeding because at the time prefiled testimony was due, Cox was still in the midst of interconnection negotiations with SWBT. Cox stated that it had recently reached an interconnection agreement with SWBT, and had therefore requested that its application for compulsory arbitration, filed April 1, 1997, be withdrawn. Cox stated, however, that the mere existence of an interconnection agreement with SWBT would not, in any way, bolster SWBT's showing with respect to "Track A" or compliance with the checklist.

MCI Telecommunications Corporation submitted comments of Frederick Warren-Boulton which were jointly sponsored with AT&T. These comments addressed the public interest case. In its oral comments, MCI noted that it supported the position of AT&T in this case.

The Oklahoma Attorney General ("AG") The AG filed Comments on March 11, 1997 addressing legal requirements of section 271 of the Federal Act. The AG takes the position that section 271 (c)(1) provides two mutually exclusive bases for SWBT to acquire in-region interLATA authority, either exclusively under Track A or exclusively under Track B. The AG states that SWBT first seems to agree that it cannot pursue Track B, but then later argues that regardless of which Track it pursues, it can satisfy the competitive checklist requirements by relying upon its statement of terms and conditions, or approved agreements, or both. The AG contends that the competitive checklist requirements can be satisfied only by approved interconnection agreements, if SWBT pursues Track A authorization, or by its Statement of

Generally Available Terms and Conditions ("STC"), if SWBT pursues Track B, but the requirements cannot be satisfied by a combination of both.

The AG states that because of the interconnection agreement with Brooks, SWBT is required to pursue authorization under Track A. The AG further states that in determining whether SWBT's interconnection agreements satisfy the competitive checklist, the standard the Commission must apply is whether, through such agreements, SWBT is actually providing access and interconnection to its facilities as opposed to merely offering such access and interconnection. The AG states that the statute uses the term "providing" access for Track A and "offering" access for Track B, indicating that Congress intended a distinction between the two terms. The AG contends that the term "providing" requires more than simply to make something available. Accordingly, whether or not an item from the competitive checklist is actually taken is a relevant criterion in the determination.

At the hearing, the AG reiterated that SWBT is still on Track A and that Track B is foreclosed because of the fact that several facilities-based competitors have requested access and interconnection with SWBT's network. The AG argued that the only vehicle available on Track A are the approved interconnection agreements. SWBT's Statement of Terms and Conditions is the proper vehicle for interLATA authority only on Track B. Since Track B is foreclosed, SWBT's STC is irrelevant in this proceeding at this time.

The AG further stated that, while SWBT has started down Track A, SWBT has not yet satisfied all of the Track A requirements. In particular, the AG contended that Track A requires a competitor to be actually providing facilities-based local exchange service to both residential and business subscribers, but that the only currently operational facilities-based competitor in Oklahoma (Brooks Fiber Communications) is providing local exchange service to residential subscribers on an exclusively resale basis only. The AG noted that this is an undisputed fact.

Moreover, the AG argued that at present SWBT fails the competitive checklist requirements because it is not providing each of the checklist elements as required by the Federal Telecommunications Act. The Act requires that access and interconnection be provided, and not merely held out, and that the Act expressly requires that each checklist item must be included in such access and interconnection. The AG states that, based upon this and upon the fact that the

Act's legislative history demonstrates Congress' intent that meaningful competition in the BOC's local exchange market was meant to be a prerequisite to a grant of in-region interLATA authority to a BOC, the actual provision of the first 13 checklist items by SWBT to one or more competitors was a necessary precondition to such authority. The 14th checklist item expressly only must be made available by SWBT, rather than actually provided.

The AG called the evidence submitted by other intervenors undisputed, maintaining that SWBT failed to proffer any evidentiary facts to rebut this evidence and that the parties were precluded from cross-examining any SWBT witnesses to determine the accuracy of the purported facts contained in the application filed with the FCC, which the AG argues constitutes unreliable and unsubstantiated hearsay. The AG thus argued that it is clear that SWBT has not fully implemented the competitive checklist because of its failure to thus far provide each of the checklist items.

The AG concluded that unless and until there is meaningful competition in SWBT's local exchange territory, as evidenced by the presence of operational facilities-based competitors provided exchange service at least predominantly over their own facilities to both residential and business, and SWBT's provision of each of the checklist items, the Commission should advise the FCC to deny SWBT's application for in-region interLATA authority, since the requirements of Section 271(c) are not satisfied until this occurs.

The Public Utility Staff ("Staff") did not file any comments or testimony. On the day of the hearing, Staff indicated that it reserves the right to argue for and/or against the ALJ's ruling at the time of the oral appeal.

Findings of Fact and Conclusions of Law

Section 271(a) of the Act prohibits a Bell operating company ("BOC") from providing interLATA services except as provided in section 271. Subsection (b) allows a BOC to provide interLATA services originating in any of its in-region states (i.e. states in which it was authorized to provide wireline telephone exchange service under the AT&T Consent Decree) if the FCC approves the application of the BOC for a particular state. This application is referred

to as a request for in-region authority. Subsection (b) states that approval of the application is governed by subsection (d)(3).

Subsection (d)(3) provides that the FCC shall not approve a request for in-region authority unless it finds that

"(A) the petitioning Bell operating company has met the requirements of subsection (c)(1) and--

"(i) with respect to access and interconnection provided pursuant to subsection (c)(1)(A), has fully implemented the competitive checklist in subsection (c)(2)(B); or

"(ii) with respect to access and interconnection generally offered pursuant to a statement under subsection (c)(1)(B), such statement offers all of the items included in the competitive checklist in subsection (c)(2)(B);

"(B) the requested authorization will be carried out in accordance with the requirements of section 272; and

"(C) the requested authorization is consistent with the public interest, convenience and necessity.

Subsection (d)(2)(B) provides that before making its determination, the FCC shall consult with the State commission of a state which is the subject of the application in order to verify the compliance of the BOC with the requirements of subsection (c).

Accordingly, pursuant to the statutory requirements of section 271, this Commission is charged with a consultative role to help the FCC determine whether SWBT has met the requirements of section 271 (c).

The first determination is whether SWBT meets the requirements of subsection (c)(1)(A) or (c)(1)(B), referred to by the parties as "Track A" and "Track B." Track A includes the requirements set forth in subsection (c)(1)(A) and Track B includes the requirements set forth in subsection (c)(1)(B). Those requirements include the following:

(c) Requirements for Providing Certain In-Region InterLATA Services.—

(1) Agreement or statement.—A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.

(A) Presence of a facilities-based competitor.—A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service ... to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing

providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier.

(B) Failure to request access--A Bell operating company meets the requirements of this subparagraph if, after 10 months after the date of enactment of the Telecommunications Act of 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1), and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f). For purposes of this subparagraph, a Bell operating company shall be considered not to have received any request for access and interconnection if the State commission of such State certifies that the only provider or providers making such a request have (i) failed to negotiate in good faith as required by section 252, or (ii) violated the terms of an agreement approved under section 252 by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement.

It is clear that SWBT cannot seek in-region authority under Track B. The record in this case is clear that the requests described in subsection (c)(1)(B) have been made. There are facilities-based providers and there are several others who have reached interconnection agreements or that have such agreements pending with SWBT. Accordingly, Track B is not available to SWBT at this time. Further, because Track B is not available to SWBT, the Statement of Terms and Conditions relied upon by SWBT has no bearing in this proceeding.

Brooks Fiber is a qualifying, facilities-based carrier under subsection (c)(1)(A) for the purpose of foreclosing a Track B application. Brooks is not currently furnishing facilities-based residential service in Oklahoma. The ALJ finds that the issue in this case is whether SWBT has satisfied the checklist by providing "access and interconnection" in such a manner as to provide for competition in the marketplace. SWBT does not have to wait for every element on the competitive checklist to be requested and used, but all checklist items must be easily and equally accessible, on commercially operational terms and on equal terms as to all. The evidence in this case is that SWBT does not currently provide all checklist items in such a manner. While the ALJ does not accept the argument that a particular quantity or quality level of competition must be reached before SWBT will be found to meet the requirements of section 271(c), SWBT must provide the items in such a manner that all carriers have an equal ability to compete. That

threshold level has not been demonstrated in this case. The evidence in this case indicates that there are currently impediments and blockades to local competition in Oklahoma.

This recommendation will not address each of the specific checklist items. By way of example, the ALJ finds that SWBT is not providing interim number portability, a process for providing collocation, or directory assistance consistent with the standard set forth above. Concerning operations support systems ("OSS"), a schedule for the implementation of electronic interfaces is attached to Commission Order No. 407704 issued on December 12, 1996 in Cause No. PUD 960000218. The implementation schedule contemplated that it could be as late as July 1997 before certain aspects of OSS would be made available by SWBT.

The parties also addressed the issue of whether SWBT had met the checklist requirements in section 271 that it provide access and interconnection at cost-based rates pursuant to sections 251 and 252. This issue was addressed in PUD 960000218 and PUD 960000242.

In PUD 960000218, Application of AT&T Communications of the Southwest, Inc. For Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996, this Commission adopted the Arbitrator's findings with respect to rates for unbundled elements in Order No. 407704 issued on December 12, 1996. The Arbitrator noted that the parties "have stipulated that until SWBT completes appropriate cost studies and submits them to the Commission and AT&T for review, until AT&T has an opportunity to complete another Hatfield study, if desired, and until the final resolution of the FCC Order in the 8th Circuit is reached, the interim rates should be adopted by the Commission, with a true-up once permanent rates are established at a subsequent hearing." (Arbitrator's Report at 19).

Further, the Arbitrator noted that he "does not recommend any particular methodology or cost study be adopted at this time." (Id. at 20). The Arbitrator specifically stated that the basis for adopting SWBT's proposed rates was that "if a true-up is needed in the future it would be easier to explain to customers rather than trying to explain a lower price being true'd-up to a higher price."

Finally, we turn to the issue of the public interest. The ALJ believes the issue of public interest is an important one, but it is not one which is included in subsection (c). Therefore, the ALJ will not address this issue, other than to say that it is clear that this Commission has been

very supportive of competition in every aspect of the telecommunications industry. The determination in this docket is not an indication that the Commission does not support competition, but simply an indication that SWBT does not meet the requirements of section 271(c) at this time.

Conclusion

The foregoing Findings and Recommendations are the Report and Recommendations of the Administrative Law Judge.

Robert E. Goldfield
Robert E. Goldfield

April 21, 1997
April 21, 1997